IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DVI FINANCIAL SERVICES, INC.,	:	CIVIL ACTION
Plaintiff,	:	
v.	:	NO. 00-CV-1666
ROBERT L. KAGAN, M.D., MAGNETIC IMAGING SYSTEMS I, LTD., and MRI SCAN CENTER, INC.,	:	
Defendants.	:	

MEMORANDUM

ROBERT F. KELLY, J. AUGUST 30, 2001

Presently before this Court is Defendant's, Robert L. Kagan ("Kagan"), Motion for Reconsideration of this Court's Order dated June 22, 2001, granting partial summary judgment in favor of Plaintiff DVI Financial Services, Inc. ("DVI"). DVI filed the underlying action after Defendants defaulted on lease and loan payments. For the following reasons, the Motion is denied.

I. BACKGROUND

Since 1983 Kagan has owned and operated magnetic resonance imaging ("MRI") centers. In September 1996, Kagan sold his MRI business, which was called MRI Scan Center, to Metropolitan Health Networks, Inc. ("Metropolitan") and became an employee of Metropolitan. Up until that time, Kagan had been president of Nuclear Magnetic Imaging, Inc., which was the general partner of Magnetic Imaging Systems I, Ltd. ("Magnetic Imaging"), the partnership which owned his MRI business.

At various times during 1996, DVI provided financing for various pieces of the Defendants' MRI equipment. The Master Equipment Lease ("Lease") identified Magnetic Imaging as the lessee. Pursuant to this Lease, DVI financed numerous pieces of equipment under five separate schedules. DVI also made a loan to Magnetic Imaging evidenced by a Loan and Security Agreement ("Loan"). The Lease and Loan were signed by Kagan in his individual capacity. In connection with the financing, Kagan, again in his individual capacity, also signed three personal unconditional continuing guaranties ("personal guaranties") dated March 25, 1996, August 27, 1996, and October 10, 1996.

In 1999, Kagan re-acquired his MRI business from Metropolitan and continued to operate it under the name MRI Scan Center. Under the Global Settlement Agreement entered into between Kagan and Metropolitan as part of the re-acquisition, Kagan became "responsible for the payment of the Equipment Leases on the MRI Scanners commencing on December 1, 1999 and thereafter." (Pl.'s Mot. for Summ. J., Ex. 7, ¶ 3.B; see also Ex. 7, ¶ 10).

The payment obligations owed to DVI are currently in default. Despite DVI's demands, the Defendants refuse to make payments. Therefore, on March 30, 2000, DVI filed this suit demanding judgment against the Defendants for the amount owed under the Lease and Loan. Discovery closed on January 8, 2001, and the dispositive motion deadline was January 29, 2001. The Defendants moved to amend their Answer to the Complaint on February 9, 2001. The Defendants' Motion to Amend was denied by this Court in DVI Fin. Servs., Inc. v. Kagan, No. 00-1666, 2001 WL 299272 (E.D. Pa. Mar. 23, 2001).

On January 10, 2001, DVI filed a Motion for Summary Judgment. After a hearing on the Motion held on May 29, 2001, this Court granted the Motion in part and denied it in part

in DVI Fin. Servs., Inc. v. Kagan, No. 00-1666, 2001 WL 706365 (E.D. Pa. June 22, 2001). Specifically, we found that:

> Although Defendants have waived the affirmative defenses of forgery and equitable estoppel, summary judgment on the issue of Kagan's liability under the three personal guaranties must be denied because genuine issues of material fact remain regarding whether DVI committed acts in bad faith which violated section 1.3(h) of the personal guaranties. However, under the Global Settlement Agreement, summary judgment will be granted on the issue of Kagan's liability under the equipment leases commencing December 1, 1999 and thereafter. Lastly, because there are genuine issues of material fact concerning whether MRI Scan is liable for its predecessor's debts under a theory of successor liability, summary judgment on that issue will be denied.

DVI Fin. Servs., 2001 WL 706365 at *5 (emphasis added). Kagan filed the present Motion for Reconsideration of the Summary Judgment Order on July 2, 2001, claiming that the decision granting judgment against him under the Global Settlement Agreement on the issue of his liability under the equipment leases commencing December 1, 1999 and thereafter was in clear error of law.

II. STANDARD

A motion for reconsideration is appropriate only where: (1) there has been an intervening change in controlling law; (2) new evidence is available; or (3) there is need to correct a clear error of law or prevent manifest injustice. N. River Ins. Co. v. Cigna Reinsurance Co., 52 F.3d 1194, 1218 (3rd Cir. 1995). However, such motions should only be granted sparingly. Armstrong v. Reisman, No. 99-4188, 2000 WL 288243 at *2 (E.D. Pa. Mar. 7, 2000).

III. DISCUSSION

Kagan claims that DVI did not assert in its Complaint that he was liable under the

Global Settlement Agreement nor did DVI seek leave of court to amend its Complaint. Kagan alleges that the first time he received notice that the Global Settlement Agreement was at issue was in the Motion for Summary Judgment. Therefore, Kagan claims that he did not receive sufficient notice of the claim or an opportunity to assert defenses to the claim. Kagan argues that he was denied due process of the law because he was not afforded the "right to know in advance the nature of the cause of action being asserted against him." Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 506 (1959). Kagan alleges that entering judgment on liability under the Global Settlement Agreement was in clear error of the law.

DVI responds that it "appropriately gave Kagan notice of its reliance on the Global Settlement Agreement in moving for summary judgment, referencing the agreement in its supporting brief, as well as in the body of its Motion, and attaching it thereto as an exhibit." (Pl.'s Resp. to Def.'s Mot. for Recons., 3). Therefore, DVI argues that Kagan did receive adequate notice of the claim and thus his rights were not violated. DVI further argues that although Kagan was apprized of DVI's contentions regarding the Global Settlement Agreement and Kagan acknowledged the existence of, and cited to, the Global Settlement Agreement in his Response to the Motion for Summary Judgment, Kagan chose not to assert defenses or an argument in his favor on that issue.[1] (See Defs.' Resp. to Pl.'s Mot. for Summ. J., 28). We agree that Kagan had sufficient notice of this issue and simply chose not assert defenses or arguments in his favor concerning the Global Settlement Agreement.

Furthermore, under FED. R. CIV. P. 54(c), "every final judgment shall grant the

[1] Kagan submitted a joint response to DVI's Motion for Summary Judgment along with another defendant, MRI Scan Center, Inc.

relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings." FED. R. CIV. P. 54(c). In Evans Products Co. v. West American Insurance Co., 736 F.2d 920 (3d Cir. 1984), the Third Circuit held that:

> [a] court is not limited to granting relief to a party solely on the basis of theories of recovery set forth in the pleadings. For instance, FED. R. CIV. P. 54(c) requires that the judgment entered shall grant the relief to which a party is entitled, even when such relief was not demanded in the pleadings.

Id. at 923. However, limits do exist regarding what relief may be granted under FED. R.CIV. P. 54(c). "What a court may do ultimately is limited by fundamental notions of due process and fair play." Id. "Relief may be based on a theory of recovery only if the theory was presented in the pleadings or tried with the express or implied consent of the parties." Id. 923-924. When relief is based on a theory of recovery which is not raised in the pleadings, FED. R. CIV. P. 15(b) also becomes relevant. Id. FED. R. CIV. P. 15(b) states that "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." FED. R. CIV. P. 15(b). Under FED. R. CIV. P. 15(b), a finding that an issue was tried by implied consent depends on "whether the parties recognized that the unpleaded issue entered the case at trial, whether the evidence that supports the unpleaded issue was introduced at trial without objection, and whether a finding of trial by consent prejudiced the opposing party's opportunity to respond." Douglas v. Owens, 50 F.3d 1226, 1236 (3d Cir. 1995). Furthermore, the principal test for prejudice in such situations is whether the opposing party was denied a fair opportunity to defend and to offer additional evidence on that different theory. Evans, 736 F.2d at 924.

Here, Kagan impliedly consented to the introduction of the issue of liability under

the Global Settlement Agreement. First, Kagan recognized that the issue entered into the case. Not only did DVI discuss the issue in their Motion for Summary Judgment and supporting brief, it also attached the Global Settlement agreement to the Motion as an exhibit. Furthermore, Kagan mentioned, and cited to, the Global Settlement Agreement in his Response to the Motion for Summary Judgment. (See Defs.' Resp. to Pl.'s Mot. for Summ. J., 28). Second, Kagan did not object to, argue against, or raise defenses to the issue of liability under the Global Settlement Agreement until this present motion. Third, the finding of summary judgment on this issue did not prejudice Kagan's opportunity to respond because Kagan was not denied a fair opportunity to defend and to offer additional evidence on the issue. In his response to the Motion for Summary Judgment, Kagan had the opportunity to address the issue of liability under the Global Settlement Agreement and to raise any defenses against it. Kagan chose not to do so. Because Kagan had sufficient opportunity to address his liability under the Global Settlement Agreement and because he impliedly consented to the introduction of this issue, this Court did not commit a clear error of law when it entered summary judgment against him on this issue. Therefore, Kagan's Motion for Reconsideration must be denied.

An appropriate Order follows.

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ROBERT L. KAGAN, M.D., MAGNETIC IMAGING SYSTEMS I, LTD., and MRI SCAN CENTER, INC.,	:	
Defendants.	:	

ORDER

AND NOW, this 30th day of August, 2001, upon consideration of the Motion for Reconsideration (Dkt. No. 21) filed by Defendant Robert L. Kagan, and any Responses and Replies thereto, it is hereby ORDERED that the Motion is DENIED.

BY THE COURT:

ROBERT F. KELLY, J.